



BellSouth Telecommunications, Inc.
Suite 2101
333 Commerce Street
Nashville, Tennessee 37201-3300

615 214-6311
Fax 615 214-7406

REC'D TN
REGULATORY AUTH.

Patrick W. Turner

July 27, 1999 JUL 27 PM 3 59

OFFICE OF THE
EXECUTIVE SECRETARY

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee*
Docket No. 98-00559

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Memorandum in Compliance with the Chairman's Request. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Patrick W. Turner

PWT:ch
Enclosure

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee**

In Re: *Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee*

Docket No. 98-00559

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EXECUTIVE SECRETARY

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
MEMORANDUM IN COMPLIANCE
WITH THE CHAIRMAN'S REQUEST**

In compliance with Chairman Malone's directive during the July 13, 1999 Conference of the Tennessee Regulatory Authority ("TRA"), BellSouth Telecommunications, Inc. respectfully submits this memorandum addressing the effect of a hypothetical finding that a termination liability provision in a CSA constitutes a penalty under state law. Using the provisions of the CSAs pending approval in Docket Nos. 99-00120 and 99-00244¹ for illustrative purposes, the following discussion addresses the effect of such a determination on: (1) CSAs that have not yet been approved by the TRA; and (2) CSAs which have been approved by the TRA.

I. PROPOSED CSAs

By their own terms, the CSAs pending approval in Docket Nos. 99-00210 and 99-00244 do not go into effect unless they are approved by the Tennessee Regulatory Authority. *See* CSA KY 98-4958 §IV.B ("In the event the V&T Agreement is denied by a regulatory agency in any state or by another regulatory body with jurisdiction over this matter ('Regulatory Agency Denial'), this Agreement shall be null and void and of no effect in that state"); CSA TN 98-2766 §IV.B ("In the event the V&T Agreement is denied by a regulatory agency in the State of Tennessee or by another regulatory body with jurisdiction over this matter, this Agreement shall

¹ The TRA has consolidated these two dockets with this proceeding for certain purposes.

be null and void and of no effect in that state."). Under Tennessee law, an agreement that is contingent upon court (or agency) approval is not effective and binding on the parties unless and until the court (or agency) actually approves it. *See Oakley v. Oakley*, 686 S.W.2d 85 (Tenn. Ct. App. 1984). Accordingly, if the TRA declines to approve either of these CSAs for any reason, the CSA does not become effective and the customer will not receive the discounts or any other benefits set forth in the CSA.

II. APPROVED CSAs

Tennessee law permits parties to stipulate to an amount of damages in order to "create certainty where damages are likely to be uncertain and not easily proven," *V.L. Nicholson Co. v. Transcon Investment*, 595 S.W.2d 474, 484 (Tenn. 1980). Tennessee courts recognize that "an individual is free to bind himself by a contract whose terms may not seem reasonable or decent to an outside observer, and the court will not concern itself with the wisdom or folly of the contract." *Brooks v. Networks of Chattanooga*, 946 S.W.2d 321, 324 (Tenn. Ct. App. 1996). Accordingly, the following rules govern a court's determination of the enforceability of a liquidated damages clause:

The amount stipulated should be reasonable in relation to the terms of the contract and the certainty with which damages can be measured; there must exist a reasonable relationship between the amount and what might reasonably be expected in the event of a breach. If the provision is a reasonable estimate of the damages that would occur from a breach, then the provision is normally construed as an enforceable stipulation for liquidated damages.

V.L. Nicholson Co., 595 S.W.2d at 484. In light of these controlling factors, determining whether a liquidated damages provision is enforceable obviously is an intensely fact-specific endeavor.

Assuming, therefore, that a customer wrongfully terminates an existing, approved CSA and contests the termination liability provisions of the CSA, a court would apply the rules

discussed above to determine whether the termination provisions constitute enforceable liquidated damages or an unenforceable penalty. If the court determined that the termination liability provisions constitute a penalty, the court would not enforce the provisions. *See Kimbrough & Co. v. Schmitt*, 939 S.W.2d 105, 108 (Tenn. Ct. App. 1996); *Beasley v. Horrell*, 854 S.W.2d 45, 48 (Tenn. Ct. App. 1993); *Eller Bros., Inc. v. Home Federal Savings & Loan*, 623 S.W.2d 624, 628 (Tenn. Ct. App. 1981). The remaining provisions of the contract, however, would continue to be in force, and the customer would be liable to BellSouth for all actual damages BellSouth incurred as a result of the customer's breach. *Id.* This is consistent with the provisions of both of the individual CSAs discussed above. *See* CSA KY 98-4958, CSA TN 98-2766 §XVI.E ("In the event that one or more of the provisions of this Agreement shall be invalid, illegal or unenforceable in any respect under any statute, regulatory requirement, or rule of law, then such provisions shall be considered inoperative to the extent of such invalidity, illegality, or unenforceability, and the remainder of this Agreement shall continue in full force and effect.").

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



Guy M. Hicks
Patrick W. Turner
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301

Bennett L. Ross
675 W. Peachtree Street, Suite 4300
Atlanta, Georgia 30375

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 1999, a copy of the foregoing document was served on the parties of record, via the method indicated:

☒ Hand
☐ Mail
☐ Facsimile
☐ Overnight

Richard Collier, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0500

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Ave., #1600
P. O. Box 198062
Nashville, TN 39219-8062

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

Jon Hastings, Esquire
Boult, Cummings, et al.
414 Union St., #1600
Nashville, TN 37219

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

Charles B. Welch, Esquire
Farris, Mathews, et al.
511 Union St., #2400
Nashville, TN 37219

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

James Lamoureux, Esquire
AT&T
1200 Peachtree St., NE
Atlanta, GA 30309

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

Vance Broemel, Esquire
Consumer Advocate Division
426 5th Avenue, N., 2nd Floor
Nashville, TN 37243

☐ Hand
☒ Mail
☐ Facsimile
☐ Overnight

Carolyn Tatum Roddy, Esquire
Sprint Communications Co., L.P.
3100 Cumberland Circle, N0802
Atlanta, GA 30339

- ☐ Hand
- ☒ Mail
- ☐ Facsimile
- ☐ Overnight

Val Sanford, Esquire
Gullett, Sanford, et al.
230 4th Ave., N., 3rd Fl.
P. O. Box 198888
Nashville, TN 37219-8888

Patricia Ture